UNITED STATES
v.
MARGARET MANSFIELD

IBLA 77-363 Decided May 15, 1978

Appeals from decision of Administrative Law Judge Dean F. Ratzman in mining contest CA-513.

Affirmed in part; reversed in part.

1. Mining Claims: Discovery: Marketability

In order to demonstrate a discovery of a valuable mineral, one must prove by a preponderance of the evidence the presence of minerals that would justify a prudent man in the expenditure of his labor and means with the reasonable prospect of success in developing a paying mine.

2. Mining Claims: Common Varieties of Minerals: Generally
Without evidence that obsidian similar to that found in great abundance elsewhere has a property giving it a special and distinct value, it is a common variety no longer locatable under the mining laws. The fact that obsidian may be tumbled and polished for rock hound purposes is not sufficient to meet the test of "uncommonness."

3. Mining Claims: Discovery: Marketability

A mineral claimant whose claim embraces deposits of both common and uncommon varieties of minerals cannot aggregate the profits returned from mining the common variety and those netted from mining the uncommon variety to show marketability.

APPEARANCES: Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the contestant. William B. Murray, Esq., Portland, Oregon, for the contestee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

In the contest proceeding, United States v. Margaret Mansfield, CA-513, both parties have appealed from a decision of Administrative Law Judge Dean F. Ratzman, dated April 29, 1977, declaring all but one of 14 mining claims invalid. The Government appealed requesting that Judge Ratzman's decision be modified to the extent that the mining claim identified as the Pink Lady lode and placer claim (Pink Lady No. 1) also be declared invalid. The contestee appeals from the Judge's decision seeking to have those claims identified as Pink Lady Nos. 2 and 3, Mohawk No. 3, and Apache Claim Nos. 1, 3, 4, 5, and 6 declared to be valid.

This contest was initiated at the request of the Forest Service. The Bureau of Land Management (BLM) in its complaint, dated October 15, 1973, contested the validity of eight placer mining claims and six lode mining claims, located in the Modoc National Forest in northeastern California. The BLM complaint asserts the following:

> A. There are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute discovery.
>
> B. The land embraced within the claims is nonmineral in character.

The contestee denied the charges. A hearing was held at Lakeview, Oregon, on November 7 and 8, 1974, and in Sacramento, California, on November 4, 1976. A deposition was taken from contestee at Alturas, California, on September 15, 1976.

The material obtained by the contestee from his claims is obsidian. It is described as a "widely-distributed glass-like lava of many colors" which is found in "deposits which contain millions of tons with unflawed blocks up to a foot or so across" (Exh. 8). The material occurs in "various colors," and "the application of the many varieties of obsidian to jewelry and ornaments are legion; it is cut as cabochons * * * or faceted into gems, it is sufficiently light in color and transparent" (Exh. 9).

The central issue before us is whether or not obsidian, in its various forms as found in the subject mining claims, represents the discovery of a locatable mineral within the meaning of 30 U.S.C.

§ 611 (1970). The contestee contends that obsidian is not a common variety stone and is therefore subject to location. Contestee further contends that the discoveries satisfy the prudent man rule with respect to marketability.

The Government produced an abundance of evidence which tended to show obsidian as an ordinary, common stone that should not be considered a locatable material. Of significance was the testimony of Henry W. Jones, a Government mining engineer, who over a 25-year period has examined thousands of claims in order to determine if they have minerals of such nature as to make them locatable under the mining law (Tr. 41). It was this witness's testimony that "obsidian occurs in an infinite variety of shapes, forms and colors." He went on to say that the obsidian found at most of the flow sites on these claims can be duplicated and that, in the Glass Butte area, for instance, there are several millions of tons of obsidian available (Tr. 84). When asked on cross-examination whether he found pink obsidian at other sites as well as at the Pink Lady claim, he answered in the affirmative, stating that pink obsidian was "as common as any of the other material that is available" (Tr. 93). A second Government witness, Emmett B. Ball, a mining engineer with some 25 years of experience, testified that the obsidian found at contestee's claims is common at many other sites and is found widespread through the western United States in great abundance (Tr. 122). Finally, Gerald E. Gould, an engineer with 15 years of experience in mining, testified that he could not "conceive that there is such a thing as an uncommon variety of obsidian" (Tr. 141).

Of particular interest is the testimony of Dale Davis, the proprietor of a rock shop in Lakeview, Oregon. This Government witness sells obsidian from his shop. He stated that "there are many places in Oregon, California and Nevada where supplies of obsidian can be obtained," and that the deposits are "practically unlimited" (Tr. 18). Mr. Davis, who sells 1 to 2 tons of obsidian annually (Tr. 22) replenishes his supply by waiting until a road is constructed in an obsidian area and then picking up the exposed pieces of obsidian (Tr. 25). He is able to sell obsidian in various colors, such as pink, green, gold, blue, lavender, and purple (Tr. 314).

From this testimony, then, it is clear that obsidian is a rather ordinary substance, easily obtained in a variety of colors, it takes a polish and can be used to make low-grade jewelry and bric-a-brac, and in many areas throughout the west the deposits of obsidian are virtually unlimited.

[1] For the contestee to prove a discovery within the meaning of 30 U.S.C. § 21 et seq. (1970), she must show the discovery of a locatable mineral of such quantity and quality that "a person of ordinary prudence would be justified in the further expenditure of

his labor and means, with a reasonable prospect of success in developing a valuable mine." Castle v. Womble, 19 L.D. 455, 457 (1894). This elemental rule of mining law has been approved by the United States Supreme Court. E.g., Christman v. Miller, 197 U.S. 313, 322 (1905), and United States v. Coleman, 390 U.S. 599 (1968). In addition, the court affirmed the "marketability rule" in Coleman, that is, it must be shown that mineral can be extracted, removed and marketed at a profit.

Contestee asserts in her brief that obsidian "possesses the qualities and texture and coloration or pattern desirable for decorative use in jewelry or the ornamental arts" and is therefore "a semiprecious stone." This Board considered such an assertion in United States v. Stevens, 14 IBLA 380, 81 I.D. 83 (1974), where the appellant asserted that cherts have the qualities of gemstones. The Board held as follows:

> The mere fact the stones may be polished is not sufficient to meet the uncommon variety test, as hardness, the prime requisite for polishing, is a property common to many types of stone found in great abundance. It is the value of the stone deposit as it is found on the claims that is the important factor, not any enhanced value which might be obtained for a fabricated or marketed product of the deposit.

[2] Contestee contends on appeal that "the fact that lapidary grade obsidian which has similar properties and values may be found in other areas is not sufficient evidence to establish that * * * lapidary grade obsidian is a common variety within the meaning of the Act of July 23, 1955 (30 U.S.C. § 611)." We disagree. The evidence clearly demonstrates that nearly all obsidian selected at random from a deposit or even from a rockbed, can take a polish. The ability of obsidian to take a polish does not in itself make it uncommon. If there is insufficient evidence that a stone is an uncommon variety within the meaning of 30 U.S.C. § 611, it is not locatable under the mining laws. United States v. Coleman, supra; United States v. Melluzzo, 70 I.D. 184 (1963). See also United States v. Shannon, 70 I.D. 136 (1963).

Contestee cites United States v. Bolinder, 28 IBLA 187 (1976), in support of her contention that obsidian is not a common variety stone. But Bolinder is easily distinguished from the instant case. Obsidian, as noted above, is located in almost limitless quantities through many areas of the west. But the finder of fact in Bolinder indicated that deposits of geodes which possess an economic value "do not occur in abundance in nature and are not widespread in their occurrence generally." Bolinder, supra at 202.

The contestee argues in brief that the Government witnesses made "sweeping generalizations" and that they "had no real understanding of differences in quality." But as noted herein, two witnesses for the Government are experts in their field, each having 25 years experience in examining mining claims. The only witnesses who testified on behalf of the contestee were Ned F. Smith and Laurence Beebe. Smith is a machinist whose hobby is rock collecting (Tr. 168), and Beebe is a school teacher by profession and a rock hound with a few courses on the college level in lapidary techniques (Tr. 6). So long as the contestee has been unable to produce a professional geologist or a witness whose trade is in the lapidary arts, the testimony of the Government expert witnesses that obsidian is only a common variety of mineral remains uncontroverted.

From the testimony of Government witnesses, we find there has been established a prima facie case of the invalidity of the contestee's claims. A prima facie case is established when a Government mineral examiner gives his expert opinion that he examined the claim and found insufficient values to support a finding of discovery. United States v. Bechthold, 25 IBLA 77 (1975). See also United States v. Heard, 18 IBLA 43 (1974). Once a prima facie case is made by the Government, it is upon the contestee that the burden of proof reposes, to show by a preponderance of the evidence that a discovery exists. See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). This she failed to do.

Assuming, arguendo, that obsidian is a locatable mineral, we next consider the question of marketability. Obsidian in the form of slabs, pebbles and boulders sold in the contestee's rock shop at prices varying from 10 cents to $1.50 (Tr. 69). The evidence shows that contestee sold "in the rough" in 1975 approximately 6,000 pounds of obsidian. Another 1,650 pounds were manufactured into articles or retained in boxes. In 1976, contestee's business operation sold most of the obsidian in rough form (Tr. D-19). Contestee also operates a camp where customers are allowed to dig for obsidian on their own. In a typical month, two or three times as much obsidian is sold in the shop as is sold on the claims (Tr. D-20). In 1976, the contestee sold 50 pounds of obsidian that was manufactured into completed articles such as lamps, chimes, and jewelry (Tr. D-16).

Contestee's net profit from the sale of obsidian is in doubt since there are no records which show the true cost. There is nothing in the record which establishes the cost of maintaining contestee's rock shop and other associated costs of obtaining the obsidian. In the absence of proof that a reasonable profit was made from the sale of obsidian from contestee's claim we must conclude from the record that the obsidian sold in rough form does not support the contention of marketability. Adrian Edward, 9 IBLA 197 (1975). Moreover the alleged profit of $1,000 worth of obsidian from gemstone

permits (Tr. 91) cannot be offered to show the market value of the claims or income from the contestee's mining operation. See United States v. Stevens, supra; South Dakota Mining Co. v. McDonald, 30 L.D. 357, 360 (1900); United States v. Elkhorn Mining Co., 2 IBLA 383, 389 (1971), aff'd, Elkhorn Mining Co. v. Morton, Civ. No. 2111 (D. Mont., filed Jan. 19, 1973). Finally, any determination of the value of the contestee's claims, must rest on the marketability of obsidian in its rough form and not upon any enhanced value from subsequent processing or craft work. United States v. Bolinder, supra at 199. See also United States v. Alexander, 17 IBLA 421, 433-34 (1974).

[3] On appeal, the contestee relies heavily on United States v. Rodgers, Contest OR 10910, November 8, 1976. In that case, Judge Ratzman dismissed a BLM complaint against a mining claim for labradorite. Rodgers, however is easily distinguished from the instant case in two ways: In Rodgers, Government witnesses conceded that some polished labradorite (from which sunstones are faceted) can be considered gemstone and secondly, the contestee was able to demonstrate to the satisfaction of the Judge that a profit of $15,000 was made from sales from the specific claim in question. In the instant case, experienced Government witnesses denied that the obsidian was of gemlike quality, and furthermore, the contestee has not been able to demonstrate the reasonable profitability of any individual mining claim, instead those profits, if any, are aggregated or made part of her entire business operation, which includes as well, profits derived from the sale of manufactured obsidian products. Moreover, the Rodgers decision has no precedential effect, as it is not a decision at the Secretarial level and is not reported or indexed pursuant to 5 U.S.C. § 552(a)(2) (1976).

Judge Ratzman decided below that the contestee's claims are invalid with the exception of the Pink Lady lode and placer claim. The Judge held that "grade one" pink obsidian found on the Pink Lady claim was sufficiently "unique in texture and color, to command a premium price and is rare" and that "a substantial quantity of grade one pink has been mined and sold," and that "[the] claims fall within the category of gem quality uncommon variety stone."

We find very little evidence in the record that pink obsidian is so unique as to warrant its identity as uncommon. Contestee's witness testified that the Pink Lady claim is the only property where "the one distinctive pink color" can be found (Tr. 184). But this statement cannot stand by itself. We note, for example, that Davis, the proprietor of a rock shop, testified that obsidian comes in a variety of colors -- green, gold, blue, pink, lavender and purple. In view of the kaleidoscopic colors and sheens of this ordinary stone, and in view of the lack of solid evidence which indicates the true uncommonness of any one color, we find that pink obsidian is not an uncommon variety of stone within the meaning of 30 U.S.C. § 611.

Assuming, arguendo, that pink obsidian is truly unique, the contestee must show that the deposit is marketable at a profit. United States v. Lease, 6 IBLA 11, 79 I.D. 379 (1972). The record of this case contains no evidentiary figures showing marketability at a profit of pink obsidian. The contestee must come forward with an accounting that not only shows a profit, but that the profits were not aggregated with profits derived from her rock shop and related operations. We have held on other occasions that where "a claim embraces deposits of both common and uncommon varieties of minerals, we cannot aggregate the profits returned from mining the common variety and the profit netted from mining the uncommon variety to show marketability." United States v. Foresyth, 15 IBLA 43, 60 (1974); see also Chas. Pfizer & Co., Inc., 76 I.D. 331 (1969).

For the reasons above, and pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Ratzman appealed from is affirmed insofar as it declared the Pink Lady Nos. 2 and 3, Mohawk No. 3 and Apache Nos. 1, 3, 4, 5, and 6 mining claims to be null and void, and reversed insofar as it held the Pink Lady No. 1 claim to be valid.

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Douglas E. Henriques
Administrative Judge

I concur:

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Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

The evidence of record establishes beyond contravention that obsidian deposits in huge quantities are abundant and widespread throughout the western United States. It is also made manifestly clear that obsidian is found in a great variety of patterns, colors and "sheens" because of the amalgamation of various and diverse minerals at the times and places of its formation, and due to such other factors as temperature, cooling time, pressures, weathering, etc. Therefore, such patterns as "mossy," "spider web," "snowflake," "banded," and others abound, and the variety of colors and "sheens" is extensive, if not infinite. The witnesses described "rainbows" and "peacocks" and green, gold, brown, silver, mahogany, purple, pink, grey, black, "black-black," among others. Frequently, the more dramatic colors are very difficult to perceive in the rough rock, even when a clean face is exposed and the stone 1/ is viewed in direct sunlight, according to the testimony and my own examination of the exhibits. Some of these colors, however, can be brought out very prominently by proper working and craftsmanship, and the stone can be fashioned into a variety of attractive and interesting artifacts.

Therefore, since it shares this capability of being worked into something attractive and desirable with other "precious" and "semi-precious" "gemstones," 2/ and commands a higher price when sold for this purpose, it is difficult to equate with ordinary, common country rock such as granite, basalt, or limestone. 3/ Nevertheless, there is no escaping the fact that millions upon millions of tons of obsidian deposits exist in this country, and the market for the raw rock is limited to those specimen collectors (rockhounds) and lapidaries who find it more convenient to simply purchase the relatively small amounts they require than to garner them themselves. The market would seem analogous in some respects to a suburbanite who wished to mix a little cement for a household project. He could, if he chose, put a shovel and a wash tub in the back of his station wagon and go look for a stream bed where he could get the requisite sand and gravel "free." He would probably prefer, however, to go to the local materials dealer and pay $2 or $3 to get what he required. He would

1/ The terms "stone" and "rock" are employed in this opinion with the author's full understanding that obsidian is actually a form of volcanic glass.
2/ However, rock shop owner Dale Davis testified that he probably sells more limestone than obsidian, the limestone being fancied because it comes in "weird shapes which people like" (Tr. 26).
3/ Several of the witnesses discussed their definitions of these terms without achieving a great deal of unanimity. Presumably, any stone that is suitable for lapidary work is regarded as a "semi-precious gemstone" by those who utilize them.

save himself time, effort, and perhaps money; he would probably get a better, selected, grade of sand and gravel, and he might obtain some advice on how best to use it. But the fact that such purchases constitute a "market" and the fact that the supplier thereby made a profit, or that a select grade of sand and gravel was exploited from a preferred deposit somewhere, do not justify a finding that the particular deposit of sand and gravel from whence it came was an uncommon variety, locatable under the mining law.

Since obsidian is abundant, widespread, and available "free" to those who wish to seek it out themselves on open land, or relatively cheaply to those who wish to purchase selected small amounts for their own hobby projects, I find no difficulty in holding that obsidian is a common variety of mineral material.

The question then arises, "Does this particular deposit of obsidian possess physical properties which are so distinctly different from other obsidian as to endow it with a special value and command a higher price than other obsidian which is used for the same purpose?"

On first analysis it would seem so. The evidence indicates that the particular shade of pink found in some of the obsidian on the Pink Lady claims is not found elsewhere, and the claimant charges a higher price for the pink because it is desired for its unusual coloration. The claimant sells her obsidian according to her own established price structure based upon the various patterns and colors and, with reference to the pink only, by a grading system which rates the quality from 1 to 3.

However, there was testimony by another rock shop owner that he employs no such price structure for different pieces. His obsidian is all priced the same - $.25 per pound in small amounts - and his customers select whatever they please.

All of the witnesses testified that the preference of the rockhounds is almost purely personal and subjective. (See, e.g., Tr. 26, 214). If a collector or craftsman sees a piece he likes he will not be deterred from buying it because it is priced $.25 or $.50 a pound higher than another piece in which he is not interested. (See, e.g., 1976 Tr. 88, 89). In this kind of a market it is not unreasonable to infer that if the claimant were to reverse her price structure and charge the highest price for the "gold" sheen and the lowest price for the pink, some customers would pay the higher price for the gold simply because they wanted gold sheen obsidian.

Moreover, the rarity of the pink is not the only price determinate. The claimant testified that she sold "copper tone" obsidian at the same price as the pink, although, "there is a lot more of them [the coppertones] than there is of the pink, but we have never

made a price difference in them" (Tr. 286). Further, the pink on this claim is by no means the only pink sheen obsidian to be found. There are frequent references in the transcript to pink obsidian from other sources, but it is contended that the tone, shade, sheen, or hue of the pink in the stone from this particular deposit is distinctive from the pink in obsidian from other sources and "better." One witness compared the pink obsidian from the Pink Lady claims with that from the Lassen Creek (Oregon) area and with the pink obsidian from Mexico. He described the Pink Lady obsidian as being "a little different than this" in that the Pink Lady material is "a little lighter" and "has a very prominent show" (Tr. 178).

Therefore, what we are considering is whether a particular shade of pink in obsidian will constitute such a significant distinctive quality as to entitle the claimant to obtain fee title to the land where it is found.

The answer must be negative. First, there are lots of distinctive deposits of obsidian, in that there is a wide range of colors and patterns, each of which may vary somewhat from one deposit to the next. "Every locality is different" (Tr. 183). So if we hold that obsidian is a common variety, which it certainly is, but recognize color and pattern variants as uncommon, we would establish a rule whereby great quantities of obsidian would be subject to location. For example, there were a number of references in the transcript to a "black-black" obsidian which apparently is found only in Nevada.

Moreover, Ned F. Smith, a man of long practical experience in this field, testifying on behalf of the claimant, stated that of all the many stones used in the lapidary craft, "obsidian is about at the bottom of the totem pole in price * * *" (Tr. 196). He and other witnesses mentioned jasper, agate, hematite, amber, turquoise, garnet, quartz, iron pyrites, petrified wood, 4/ fossils, and meteorites as examples of stones and minerals which are so used. 5/ Smith described an area where many of these "gemstones" could be found which extended from Homedale, Idaho, to near Prineville, Oregon; an area which he said is "half as big as the State of Oregon, or bigger" (Tr. 199). If he is to be believed, and I see no reason to doubt his credibility, there are a great number of deposits throughout this region -- and elsewhere throughout the West -- of stones which are more valuable for

4/ Petrified wood has expressly been excluded from mineral location by statute (30 U.S.C. § 611), and free collection of limited amounts is provided by regulation (43 CFR 3622). The statute defines it as "agatized, opalized, petrified or silicified wood or any material formed by the replacement of wood by silica or other matter."

5/ In addition to natural stone or mineral, the record also shows that coral, fossils, shells, horn, glass, plastic, and synthetic stones are also so used.

specimen collecting and lapidary purposes than is obsidian. If obsidian may be treated as locatable, then certainly all of the very numerous deposits of other, more valuable, lapidary stones on public lands are also subject to appropriation under the law. The effect of this would be to interdict or greatly hinder the recreational activities of rockhounds who engage in their searches in furtherance of their hobby, rather than as commercial pursuit.

This effect has already transpired on the subject claims. Where once rockhounds came freely to these deposits on the national forest to seek a few "good" pieces, they are now obliged to pay the appellant what amounts to a royalty for anything they choose to take. This is in some ways analogous to the Alaska Trade and Manufacturing Site Law, 6/ concerning which it has been held:

> [T]he scope of the Act is not so broad as to authorize a citizen to lay claim to the public land for the purpose of charging a fee for the privilege of hunting wild game thereon, notwithstanding that such lands may have been improved by the construction of shooting boxes or blinds. (Citation omitted.)

Lloyd Schade, 12 IBLA 316 (1973).

Appellant would have us distinguish this rule, and the rule in United States v. Stevens, 14 IBLA 380, 81 I.D. 83 (1974) (in which the locator charged rockhounds for the privilege of searching for "gemstones" on his claims), from her own use of the claims by pointing out that Stevens was selling permits to the public to enter and look for stones, whereas she charges only for the stones actually found and removed by members of the public. To test the validity of this theory, let us hypothesize a situation where a claimant locates placer claims along the banks of a stream containing gold-bearing sand and gravel, but there is insufficient gold to support a conventional mining operation, and thus, it could not be said that a discovery of a valuable mineral deposit had been made. However, if the claimant allowed access to the claims by recreation miners who were willing to devote a disproportionate amount of time and energy to the task for the pleasure of finding their own gold, and charged each one a royalty or fee based upon his recovery, the claimant could make a profit with very little labor or expense. Gold is certainly a locatable mineral and the claimant would, under these circumstances, be able to realize a profit by reason of its presence in the claimed deposit. But the profit would not derive from the claimant's exploitation of the gold, but rather from the claimant's exploitation of the public's interest in recovering the gold as a recreation activity. This is surely not

6/ 43 U.S.C. § 687(a) (1970).

the discovery of a "valuable mineral deposit" which the general mining law intended to encourage and reward.

As to the collection by the claimant herself (or by others on her behalf) of selected pieces from the claims, which she then sells for her own account, there is inadequate showing of costs and profit. At the first hearing the claimant was unable to indicate what her mining costs might be. She subsequently attempted to calculate her costs by several experimental ventures to the claims with her husband, where they collected obsidian and delivered it to the shop. She described these ventures later in a deposition which was incorporated in the record (Dep. 12-14). She charged their time at $2 per hour each, and added the cost of gasoline, plus $.125 per mile for the vehicle used. Using these figures only, she concluded that the recovered rock cost about $.08 per pound. This assessment is alright, as far as it goes, but it seems to presume that all of the rock is sold immediately on delivery without further expense. It allows nothing for the cost of maintaining the claims, the bulldozer work, road construction and maintenance. The rocks are sold from a shop in relatively small quantities over a term of time. The estimate does not include any attribution for shop overhead and other business expenses or claimant's time devoted to sales. Presumably, there is some wastage, but if so, no account has been taken of its effect on the incremental cost. She gives away good quality "gold sheen" stone as a public relations gesture, but the cost of this stone is not added to that which is sold. She does some advertising, but that cost is not included. In short, while I believe that the claimant's cost estimate of $.08 per pound was reached with honest intent, it omits so many cost factors that it can only serve to establish that the actual cost must be considerably higher.

The administrative law judge held that the various colors and patterns of obsidian sold by the claimant, other than the pink, were common varieties. The claimant did not appeal from his decision. The claimant also sells jewelry, wind chimes, lamp shades, wall panels, bookends and other artifacts crafted from stone, the value of which is almost entirely attributable to the labor, workmanship and imagination, or artistry, which the finished product represents, and which bears no relationship whatever to the value of the material. The claimant also sells rocks and minerals other than obsidian.

Thus, if we were to take the claimant's net income and deduct all of the proceeds from her sales of rocks and minerals other than obsidian, and deduct the proceeds of all sales of common varieties of obsidian other than the pink, and deduct the proceeds of all sales of polished stone and manufactured products, and deduct all proceeds from "you-dig-it" sales (which include varieties other than the pink), we might have some notion of the value of the pink to the claimant.

But as matters now stand, even were we to agree that the unique coloration of this particular pink deposit might be sufficient to distinguish it from all of the varieties of patterns and colors of other obsidian, we would still be obliged to hold that the claimant has not demonstrated that the pink obsidian mined and sold by her has such a significantly higher value as to remove it from the same category of "common variety" stone to which other obsidian belongs.

Accordingly, I concur in the holding that the claims are invalid.

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Edward W. Stuebing
Administrative Judge